

PUBLIC MEETING MINUTES

October 13, 2011

PUBLIC EMPLOYMENT RELATIONS BOARD
1031 18th Street
Sacramento, CA 95811

Chair Martinez called the meeting to order at 10:05 a.m.

Members Present

Anita I. Martinez, Chair
Alice Dowdin Calvillo, Member
Sally M. McKeag, Member
A. Eugene Huguenin, Member

Staff Present

Suzanne Murphy, General Counsel
Les Chisholm, Division Chief, Office of General Counsel
Shawn Cloughesy, Chief Administrative Law Judge
Eileen Potter, Chief Administrative Officer

Call to Order

After establishing that a quorum had been reached, Chair Martinez called the meeting to order for a return to the open session of the August 11, 2011 Public Meeting. She reported that the Board met in continuous closed session to deliberate on pending cases on the Board's docket, pending requests for injunctive relief, pending litigation and personnel matters, as appropriate.

Chair Martinez read into the record the decisions that issued since the open session in August. Those were PERB Decision Nos. 2182a-M, 2194-E, 2195-H, 2196-S, 2197-S, 2198-M, 2199-M, 2200-E, 2201-H, 2202-M, 2203-M, 2204-M, 2205-E, 2206-M, 2207-M, 2208-E, and 2209-M, and Ad-390-M. In Request for Injunctive Relief (I.R.) No. 602 (*San Mateo County Firefighters, IAFF Local 2400 v. Menlo Park Fire Protection District*), the request was denied, I.R. 603 (*City of San Jose v. International Brotherhood Of Electrical Workers, Local 332 & Operating Engineers Local Union #3*), the request was denied, I.R. 604 (*SEIU Local 521 v. County of Kings*), the request was granted, I.R. 605 (*International Association of Firefighters, Local 1319, AFL-CIO v. City of Palo Alto*), the request was denied, and in I.R. 606 (*McFarland Teachers Association v. McFarland Unified School District*), the request was denied. A document containing a listing of the

aforementioned decisions was made available at the meeting. A list containing the decisions is available on PERB's website.

Motion: Motion by Member McKeag and seconded by Member Huguenin, to close the August 11, 2011 Public Meeting.

Ayes: Martinez, McKeag, Dowdin Calvillo and Huguenin.

Motion Adopted – 4 to 0.

Without objection, Chair Martinez adjourned the August 11, 2011 Public Meeting. She then opened and called to order the October 13, 2011 Public Meeting. Member McKeag led in the Pledge of Allegiance to the Flag.

Minutes

Motion: Motion by Member Dowdin Calvillo and seconded by Member McKeag, that the Board adopt the minutes for the August 11, 2011 Public Meeting.

Ayes: Martinez, McKeag, Dowdin Calvillo and Huguenin.

Motion Adopted – 4 to 0.

Comments From Public Participants

Mr. Giorgio Cosentino appeared before the Board, representing himself as a public employee. Mr. Cosentino has worked as a Scientist for the State of California, Department of Public Health for almost 20 years. He stated that he had two matters of concern which prompted his appearance at the Board.

His first concern pertained to PERB's decertification and severance forms and booklets that are available on the website. Mr. Cosentino stated that PERB should review these documents with the intent of making them more user friendly and that information regarding the signature collection process should be clearly spelled out. He expressed frustration regarding the difficulty of contacting union members when they are located throughout the State, lack of cooperation from his union to provide him with member information, and member privacy concerns. His second issue was that PERB should review current mechanisms in place for resolving internal union disputes. Mr. Cosentino stated that there are no clear procedures to resolve such disputes though there are laws that regulate these issues. He expressed frustration regarding the impossibility of circulating petitions to recall officers of the union. Mr. Cosentino acknowledged that his review of PERB cases in this area demonstrated that many of the cases should not have been filed at PERB. In summary, he asked that the decertification and severance petition documents be reviewed and that PERB also review current mechanisms for internal disputes.

Member Dowdin Calvillo thanked Mr. Cosentino for his appearance before the Board and his request for review of the information and forms provided by PERB regarding severance and

decertification petitions. She stated that PERB was always interested in constituent input to keep PERB processes efficient and clear.

Member Huguenin commented that Mr. Cosentino should continue to look at other available remedies for resolving internal union disputes.

Report by PERB Chair

Chair Martinez announced the date for the PERB Advisory Committee meeting, Tuesday, November 29 at 10 a.m. The meeting is to be held at the PERB Headquarters Office in Sacramento. Chair Martinez encouraged PERB staff and constituents who were interested to submit items for discussion for the agenda that was to be compiled for the meeting.

Staff Reports

The following staff reports were received with the caveat that any matter requiring action by the Board and not included as an item in today's agenda would be scheduled for consideration at a subsequent meeting.

a. Administrative Report

Chief Administrative Officer Eileen Potter reported on a couple of items. She stated that the submission of budget schedules for the 2012-2013 Governor's Budget was in its final phases. All schedules had been submitted to the Department of Finance as required. Ms. Potter reported that with assurance from the Department of General Services, Real Estate Design Services, the lease renewals for PERB's Oakland and Sacramento Regional Offices were on track for completion prior to their expiration dates. In the Oakland Regional Office, Ms. Potter stated that surveys were to be ordered for American with Disabilities Act and asbestos compliance. She concluded that a major hurdle had been cleared with the approval of exit plans from that PERB office meeting the State's Fire Code.

b. Legal Reports

Suzanne Murphy, General Counsel, reported that the monthly activity and litigation reports had been distributed to the Board for its review. From those reports Ms. Murphy recapped the following information since the Board's last Public Meeting in August. With respect to unfair practice charges during the months of August and September, Ms. Murphy reported that 170 new cases were filed with the General Counsel's Office (up by four cases over the prior two-month period); 178 case investigations were completed (down by two cases over the prior period); and a total of 48 informal settlement conferences were conducted by staff (down by 31 over the prior period). Ms. Murphy explained that the drop in settlement conferences held had to do with efforts to schedule the conferences closer to available hearing dates, plus vacation schedules, and stepped-up efforts to conclude each conference in a single day to conserve staff resources. She stated the General Counsel's Office was experiencing good results from robust settlement efforts at informal conferences.

Ms. Murphy also reported on the disposition of the five requests for injunctive relief (I.R.) which were filed since the Public Meeting in August as follows:

1. I.R. Request No. 602 (*San Mateo County Firefighters, IAFF Local 2400 v. Menlo Park Fire Protection District*). The issue was whether the district violated the Meyers-Milias-Brown Act (MMBA) by engaging in bad faith piecemeal and regressive bargaining, making an unlawful unilateral change in the terms and conditions of employment, and repudiating two separate settlement agreements. The request was denied on August 24 after early and on-going efforts to resolve the matter, and the charge is being processed in the General Counsel's Office normal rotation.

2. I.R. Request No. 603 (*City of San Jose v. International Brotherhood Of Electrical Workers, Local 332 & Operating Engineers Local Union #3*). The issue was whether the unions representing city employees at the San Jose Water Pollution Control Plant violated the MMBA by initiating a strike or other work stoppage by certain essential employees who left work without completing their assigned shifts or refused to cross an area standards picket line. The picketing was allegedly directed at a private contractor that was performing construction work at the plant on August 18. This I.R. Request was denied on August 25. After informal discussions between PERB and the parties, the unions agreed to give the city prior notice of any future picketing, and to picket only during daytime shifts, for no more than 8 hours per day, and for no more than two consecutive days at a time. In a related court action initiated by the county, a temporary restraining order was entered on August 19 by the Santa Clara Superior Court. By request of the city, that order was promptly vacated to allow for PERB efforts to resolve the matter informally. That case remains pending in superior court.

3. I.R. Request No. 604 (*SEIU Local 521 v. County of Kings*). The issue was whether the county violated the MMBA by: (1) allegedly revoking its three-year contract bar rule in the middle of a multi-year memorandum of understanding with SEIU in order to favor a competing union, the California League of City Employees Association (CLOCEA); (2) moving the remaining window period from January 2012 to July 2011 in order to favor CLOCEA; and (3) scheduling a decertification election with mail ballots to be returned by September 23. Ms. Murphy reported that there was a related charge involving allegations that the county had limited SEIU representatives' access to bargaining unit employees during June and July 2011, and had discouraged employees from supporting SEIU in the scheduled decertification election. This I.R. Request was granted by the Board on September 2, but the matter was placed in abeyance pending a response from the State Mediation and Conciliation Service (SMCS) to a PERB request that SMCS refrain from sending out the ballots in that decertification election until the PERB administrative process could be completed. SMCS notified the General Counsel's Office immediately that it would comply with the Board's request. An expedited hearing was held on Friday, September 9. An administrative law judge's (ALJ) proposed decision issued on September 28, concluding that the county had interfered with SEIU's and the unit members' representational rights, and unlawfully assisted CLOCEA to obtain an early decertification election. The parties subsequently settled the matter accepting the ALJ's

proposed decision as final and binding on the parties only, and the complaint regarding the related access violations was withdrawn.

4. I.R. Request No. 605 (*International Association of Firefighters, Local 1319, AFL-CIO v. City of Palo Alto*). This request was originally filed as I.R. Request No. 601 in early August. The current I.R. Request No. 605 was filed on September 8, 2011. The issue was whether the city violated the MMBA by failing to consult in good faith with Local 1319 before voting to place on the November 8 ballot a measure to repeal a charter provision that has provided for interest arbitration since 1978. The request was denied on September 14. A complaint issued and the matter was set for an expedited hearing that was held on September 26 and 30. The matter is currently under submission.

5. I.R. Request No. 606 (*McFarland Teachers Association v. McFarland Unified School District*). The issue was whether the district violated the Educational Employment Relations Act (EERA) by issuing a subpoena commanding the union president to testify about private communications he had with a unit member who had been discharged and was going through disciplinary proceedings. The request was denied on September 15 and the charge is being processed in the General Counsel's Office normal rotation.

In terms of litigation, since the August Public Meeting, one new litigation matter was filed against PERB in the Alameda County Superior Court. In that case the California Correctional Peace Officers Association (CCPOA) filed a petition for writ of mandate pursuant to California Code of Civil Procedure section 1085, seeking to set aside the dismissal of the unfair practice charge in PERB Decision No. 2196-S. In that PERB decision, the majority held that to state a prima facie claim of bad faith refusal to bargain the effects of a decision by prison authorities to change their policy regarding searches of staff for contraband, CCPOA was required to specifically demand bargaining over the reasonable anticipated effects of that decision, notwithstanding the employer's failure to notify CCPOA of the change before it was implemented.

Regarding case determinations since the last Public Meeting, PERB received one final court ruling. In the *County of Riverside v. PERB; SEIU Local 721*, the California Supreme Court denied review of the decision of the Court of Appeal, Fourth Appellate District, Division Two, which had denied the County's petition for writ of extraordinary relief as to PERB Decision 2119-M. In that case, the Board found that comments by two members of the County Board of Supervisors constituted threats of reprisal and violated the MMBA, among other rulings.

Ms. Murphy concluded by reporting on personnel matters. She announced that two attorney vacancies had been filled in the General Counsel's Office.

In late July, Daniel Trump, a 2010 graduate of the University of Michigan Law School, joined PERB's San Francisco Regional Office as an entry level Regional Attorney. Before coming to PERB, Mr. Trump was a law clerk for the National Transit Employees Union, where he spent a year working on the nationwide organizing drive for airport security officers employed by the Federal Transportation Security Administration Agency.

In late October, PERB will also welcome Bernhard Rohrbacher, who graduated from Loyola Law School in 2001 and has a Ph.D. in Linguistics from the University of Massachusetts, Amherst. Mr. Rohrbacher will be joining PERB's Los Angeles Regional Office as a Supervising Regional Attorney. For the past six years, Mr. Rohrbacher has been the Director of Representation and the General Counsel for the California Faculty Association, and was previously an associate with labor law firms in Los Angeles and New York. Mr. Rohrbacher also clerked for the Honorable Harry Pregerson of the United States of Court of Appeals for the Ninth Circuit.

Chief ALJ Shawn Cloughesy reported on the activities of the Division of Administrative Law and stated that the ALJ report had been distributed to the Board for its review. Mr. Cloughesy reported that the number of cases pending among the six ALJs at PERB is 122. At this same time last year, there were 66 cases. Mr. Cloughesy stated that with an additional ALJ, the number of proposed decisions issued are two and one-half times more than last year. He continued that the number of case closures are up (about 33 percent) and cases are now being scheduled three to four months from the date of the informal settlement conference to the initial date of hearing. In Sacramento and Oakland, hearing dates are scheduled within four months of the informal settlement conference and in Glendale within five months. Mr. Cloughesy gave credit to the General Counsel's Office for the successful settlement of cases at informal conferences which helped to keep the already excessive ALJ caseload from overload.

Chair Martinez congratulated Chief ALJ Cloughesy on his County of Kings proposed decision. That was the decision which was the result of I.R. Request No. 604 reported above. Mr. Cloughesy stated that the parties were very cooperative in the formal hearing processes of this case.

c. Legislative Report

Les Chisholm, Division Chief, Office of the General Counsel, reported that the Legislative Report was circulated to the Board for its review. Mr. Chisholm reported on one item that was not included in his most recent written report that had to do with the status of the Governor's organization plan. He stated that a new California Department of Human Resources, essentially merging the Department of Personnel Administration (DPA) and the State Personnel Board (SPB), became effective September 9 and takes effect July 1, 2012. Mr. Chisholm also reported that there were nonsubstantive changes to the statutes that PERB administers, particularly with the Dills Act, that will take effect. He will keep the Board updated, and also update PERB statutes, as legislation to conform those statutes actually occurs.

Mr. Chisholm then reported on the following legislative activity since the last Public Meeting, stating that any legislation approved and chaptered would take effect January 1, 2012, except for the DPA/SPB merger mentioned above.

Assembly Bill (AB) 101 (John A. Perez) — Vetoed. This legislation would have created a new collective bargaining statute within PERB jurisdiction, under the Education Code, covering child care providers.

Assembly Bill 195 (Roger Hernandez) — Chaptered. AB 195 adds section 3506.5 to the MMBA which defines unfair practices by an employer.

Assembly Bill 501 (Campos) — Chaptered. AB 501 makes changes to EERA with respect to definitions. It first revises the definition of exclusive representative to expressly include any organization recognized or certified to represent any public school employee that is otherwise defined in the act and taking out the reference to “certificated or classified.” The bill also expands the definition of public school employer to include specified auxiliary organizations established in the community colleges and other joint powers agencies that meet certain criteria. In answer to Member McKeag’s question, Mr. Chisholm stated that PERB would assess whether any revisions are required to its regulations as a result of this legislation.

Assembly Bill 646 (Atkins) — Chaptered. This legislation amends the MMBA to provide for factfinding and also provides a role for PERB with respect to factfinding among local agencies. The essence of the bill provides a mechanism for an exclusive representative to request, under certain circumstances, that the parties’ dispute be submitted to factfinding. PERB would not incur any of the costs associated with the factfinding, the parties would be required to split the cost for the factfinding chair and panel members. The bill is structured like factfinding under EERA with respect to timeframes and spelling out the factors to be considered by the factfinding panel.

Chair Martinez inquired about the bill’s intent that PERB take the lead in appointing the chairperson and if the parties were not happy with the PERB-appointed chairperson, they could select their own.

Mr. Chisholm stated that was an issue that would be need to be addressed through regulations. The bill is similar to EERA. That is, PERB shall appoint a chairperson and the parties have a right within five days to select someone in lieu of the person appointed by the Board. He continued that in his experience with factfinding under EERA the parties have normally selected the chairperson and PERB has done so only when the parties could not. The process has worked in this manner even when PERB bore the cost of factfinding.

In response to California Teachers Association Representative Kevin Colbern’s statement about policy without reference to the law, Mr. Chisholm explained that there were areas that would require regulatory action by PERB to develop, with input from interested constituents, an efficient process for factfinding.

Member Huguenin commented about his experience with the impasse procedures under EERA in that the mediator held impasse in his hands until he, the mediator, determined that the matter was ready to be certified to factfinding. He stated that it was his understanding of this statute that now the employee organization can trigger, with a request, the matter to

factfinding and that the parties would then proceed to factfinding without regard to certification by the mediator. He stated that while developing regulations for the MMBA, perhaps now would be the time for PERB to assess and unite the procedures in the statutes under its jurisdiction with regard to the triggering mechanisms for both impasse certification and proceeding to factfinding.

Mr. Chisholm agreed there is a difference in the statutory language under EERA versus the MMBA with respect to factfinding and PERB's role, as well as the mediator's role. He clarified that currently, under EERA, the parties proceed to mediation when they mutually agree or it is certified by PERB. There is no such provision in the statute for the MMBA. He continued that although originally written to operate exactly like EERA in this regard, those provisions were deleted from the bill. The bill also does not provide that the mediator certify the matter to factfinding, which is required under EERA and the Higher Education Employer-Employee Relations Act. Mr. Chisholm stated that EERA was simple with regard to PERB's role in factfinding and that there are two parts required when proceeding to factfinding, a request by one of the parties and the mediator's certification. PERB then has no discretion when carrying out its statutory role with respect to the appointment of a chairperson of the panel. He concluded that PERB would need to assess and adopt regulations to address the process to be implemented for the MMBA to minimize any unfair practice charges that may be filed as a result of this legislation.

Senate Bill (SB) 609 (Negrete McLeod) — Chaptered. SB 609 amends each of the seven statutes under PERB jurisdiction to provide that if a decision by an administrative law judge regarding the recognition or certification of an employee organization is appealed to the Board, that decision will become final and binding unless the Board acts on the appeal within 180 days. Mr. Chisholm stated that possible implementation of regulations might prove helpful in terms of clarifying exactly what types of decisions this legislation applies to, particularly where disputes come before the Board as unfair practice charges. He gave as an example the aforementioned Kings County decision where the dispute involved a recognition/certification issue.

Senate Bill 857 (Lieu) — Chaptered. This legislation amends the seven statutes under PERB jurisdiction to provide that PERB does not have authority with regard to recovery of damages due to an unlawful strike or to award strike preparation costs or expenses as damages.

Mr. Chisholm will continue to monitor the aforementioned legislation and keep the Board apprised of future developments.

Motion: Motion by Member Huguenin and seconded by Member Dowdin Calvillo that the Legal (including General Counsel and Chief Administrative Law Judge), Administrative, and Legislative Reports be accepted and filed.

Ayes: Martinez, McKeag, Dowdin Calvillo and Huguenin.

Motion Adopted – 4 to 0.

Old Business

None.

New Business

None.

General Discussion

Chair Martinez announced that there being no further business, it would be appropriate to recess the meeting to continuous closed session and that the Board would meet in continuous closed session each business day beginning immediately upon the recess of the open portion of this meeting through December 8, 2011 when the Board will reconvene in Room 103, Headquarters Office of the Public Employment Relations Board. The purpose of these closed sessions will be to deliberate on cases listed on the Board's Docket (Gov. Code, sec. 11126(c)(3)), personnel (Gov. Code, sec. 11126(a)), pending litigation (Gov. Code, sec. 11126(e)(1)), and any pending requests for injunctive relief (Gov. Code, sec. 11126(e)(2)(c)).

Motion: Motion by Member McKeag and seconded by Member Dowdin Calvillo to recess the meeting to continuous closed session.

Ayes: Martinez, McKeag, Dowdin Calvillo and Huguenin.

Motion Adopted – 4 to 0.

Respectfully submitted,

Regina Keith, Administrative Assistant

APPROVED AT THE PUBLIC MEETING OF:

Anita I. Martinez, Chair